United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7004

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

B

JUNIA E. RAAB,

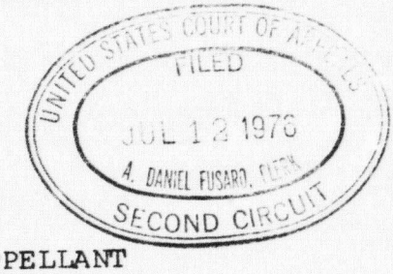
Plaintiff-Appellant

-vs-

P/S

TABER INSTRUMENT CORPORATION, a New York Corporation, JOSEPH P. D'ANGELO, also known as FRANK WEBER, BENJAMIN MANASEN, and WARREN J. HILDEBRANT, CINDY R. TABER and MARINE MIDLAND BANK-WESTERN, Executors of Ralph F. Taber, Deceased

Defendants-Appellees



Docket No. 76-7004
Docket No. 76-7130

REPLY BRIEF FOR PLAINTIFF-APPELLANT

Appeals from Judgment of Dismissal entered November 25, 1975, in the United States District Court for the Western District of New York, and from the Decision and Order, dated March 9, 1976, of the same Court.

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TABLE OF CONTENTS

Page

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DEFENDANTS' BRIEF GROSSLY MISREPRESENTS THE FACTS

The presentation in defendants' brief of the facts and circumstances of this litigation contains so many serious distortions and misstatements of the record that it is necessary at the outset of this reply to recapitulate the actual chronology of events as set forth in the record.

Both the Less and Raab actions were filed in May 1967 (Less on May 9 and Raab on May 10); both suits were based upon violations of Sections 10-b, 27 and 29 of the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission, and alleged that Taber Instrument Corp. ("TIC") purchased the plaintiffs' respective shares of stock in TIC without disclosing the fact that serious negotiations were then in progress for the acquisition of TIC by Teledyne, Inc. for a much higher price than either plaintiff received for his stock; each plaintiff sought rescission of the purchase of his stock, or if rescission were for any reason denied, money damages, i.e., $1,400,000 in Less and $60,000 in Raab ; both plaintiffs were represented by the same counsel.

Extensive discovery by way of depositions was taken by the plaintiffs and the defendants on numerous occasions during the period 1967-1972, ending with the taking of certain depositions in Less by defendants in October 1972. In addition, the plaintiffs unsuccessfully sought to take depositions in early 1971 of representatives of Teledyne, who resided in California, and of defendant Himmelfarb, who resided in Mexico.

Following the conclusion of their discovery, plaintiffs' counsel filed notes of issue in October 1971 for both Less and Raab, for the November 1971 trial term. At the call of the calendar for that term, counsel for plaintiffs answered both cases ready.

From that point the progress of the two actions to trial was continually regulated and supervised by the Court, including pretrial conferences held before the Magistrate on August 17, 1972, and February 7, 1973, pretrial conferences and meetings held before the District Judge on March 13, 1973, February 7,1974, April 29, 1974, June 3, 1974.

At each of said occasions plaintiffs' counsel stated that plaintiffs were ready in both cases. However, at the August 1972 conference before the Magistrate counsel for defendants stated they were not ready, because they wished to take additional depositions. Their additional depositions were subsequently taken in October 1972, pursuant to notices served by the defendants after the August 1972 pretrial conference. At the February 1973 conference before the Magistrate the defendants reported that they were now ready in both actions, and the Magistrate stated that he would refer both actions to the Court for the scheduling of trial.

Thereafter the progress of the two cases was inter-

rupted by various matters beyond the control of the plaintiffs, including the death of Ralph Taber on February 16, 1973, the lapse of nearly 5 months before executors of his estate were appointed, and delays while the defendants made arrangements for the appointment of counsel for the Taber estate, and of substitute trial counsel for TIC, Manasen and Hildebrandt, in place of Mr. McDonough who was precluded by the canons of ethics from acting as trial counsel for any party because of his status as a witness in both actions.

At the June 3, 1974, conference it was agreed by counsel for all parties that Less be tried first, and that Raab be deferred until after disposition of Less. Plaintiffs' counsel asked for an early trial date, and upon the statement by counsel for the Taber estate that because of other commitments they could not proceed to trial before October 1974, the Court scheduled Less for trial on October 15, 1974, and confirmed the agreement of counsel that Raab be deferred.The Less trial date was later adjourned to November 5, 1974, at the request of the defendants.

Charles McDonough died on August 16, 1974, after substitute trial counsel had taken over the representation of all parties formerly represented by him, and the preparations for trial of Less on the Court scheduled date continued without interruption.

On the eve of trial, Less was settled for $560,000; that settlement was concluded and the action discontinued on December 3, 1974.

There followed negotiations in December of 1974 and January of 1975 regarding settlement of Raab, which proved unsuccessful, and plaintiffs' counsel so reported to the Court, which then scheduled a pretrial conference on March 19,1975. At that conference, counsel for the principal defendants (the Taber estate and TIC) stated that additional discovery was required, and over the objection of plaintiff's counsel the Court granted the defendants additional time for discovery, until May 1, 1975.

However, no such additional discovery was thereafter undertaken by counsel for the defendants, and instead on April 29, 1975, they served a motion to dismiss for failure of prosecution. Said motion was granted by the District Judge on November 25, 1975.

In substantiation of the foregoing summary, plaintiff invites the Court's attention to the docket entries in Raab and Less (A. 1-12a); the affidavits submitted by plaintiff in opposition to the defendants' motion to dismiss (A.243-297, 330-345); the district court's order of June 3, 1974 (A.164); the affidavits submitted in support of plaintiff's motion to

set aside the judgment of dismissal (A.376-438, 529-551); the transcript of the March 19, 1975, proceedings (A. 394-408); the pretrial statement of plaintiffs Less and Raab (A. 101-112); the pretrial statement of defendants TIC et al (A. 113-116), wherein said defendants conceded the essential accuracy of the statements of fact given in the plaintiffs' pretrial statement.

From the foregoing it will be seen that the Less and Raab cases were always regarded as companion cases, and that Less was regarded by all parties as the lead case because its magnitude was so many times that of Raab. There was continual activity in the combined litigation leading to the settlement of Less in November, 1974, for $560,000.

As pointed out in plaintiff's main brief, it is undisputed in the record that after filing notes of issue in both cases in October 1971, plaintiffs' counsel answered both cases ready at the ensuing calendar call, and at every call or pretrial conference thereafter.

As set forth in detail in the record, throughout the course of the litigation numerous delays attributable to defendants were occasioned by their failing repeatedly to make themselves available for depositions noticed by the plaintiffs, delaying the taking of their own discovery, procrasti-

nating over the appointment of substitute counsel in place of McDonough, who the defendants had known from the beginning of the litigation was precluded from acting as trial counsel because of his status as a witness in both cases, and other matters, more fully described in the affidavits submitted on behalf of the plaintiff already referred to in this brief.

The record shows that in contrast to the protracted delay and procrastination of the defendants in appointing substitute counsel on behalf of the Taber estate and TIC, plaintiffs' counsel timely engaged substitute trial counsel, as required under the canons of ethics in view of the status as witnesses of plaintiff's counsel Murphy and Sweet, and that not one day's delay in the progress of the proceedings was thereby occasioned.

It is also clear from the record that the Siemer firm was involved in the litigation by at least July 1973 , (A. 256-257) but delayed until February and March 1974, being substituted of record in the two actions, despite numerous inquiries in that regard by plaintiffs' counsel, and that at the June 3, 1974 conference with the Court, when plaintiffs repeated their request for an early trial, the Siemer firm delayed the proceedings further by announcing that they could not be ready for trial until October 1974. See trans-

cript of proceedings held June 3, 1974, etc. (R. 167*) at p. 29 thereof.

THE DEFENDANTS' BRIEF IS REPLETE WITH PURPORTED STATEMENTS OF FACT WHICH ARE UTTERLY WITHOUT FOUNDATION IN THE RECORD.

In straining to defend the injustice done to plaintiff Raab, the defendants throughout their brief have resorted to reciting as fact naked allegations which are without color of foundation in the record. The following examples illustrate the defendants' willingness to falsify and distort the record in an effort to mislead even this court:

1. At the bottom of Page 2 of defendants' brief the statement is made that Raab was discharged "after an investigation by one of the company's officers disclosed that on a number of occasions Raab had converted company money into property of his purposes. App. 25-26, 146."

The record references given wholly fail to substantiate that charge and there is no foundation for it elsewhere in the record. In addition, in the beginning paragraph of one of the references, App. 146, which is a memorandum

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* When used herein "R" refers to document numbers as listed in the Supplemental and Revised Index to Record on Appeal, of documents not reproduced in the Appendix.

filed by defendants' counsel in 1974, it is acknowledged that Raab was not discharged, as defendants now assert, but that he resigned from his position with TIC.

2. In a footnote at pages 3 and 4 of their brief the defendants for some reason have seen fit to refer to the financial resources of several of the individual defendants. D'Angelo is there described as "a local dentist without substantial personal assets. " However, in truth, as the record shows, D'Angelo was an insider who profited handsomely in the TIC-Teledyne, by reason of his timely purchase for $70,000.00 of 7000 of Less' former shares, worth $350,000.00 at the Teledyne acquisition price, in addition to which he received a finder's fee of 5 percent of the $3.8 million acquisition price. See Minutes of Special Meeting of Directors of TIC on July 27, 1966 (Exhibit No. 10*).

That same footnote also portrays Hildebrandt as "without substantial personal assets," again without foundation in the record.

3. In a lengthy footnote at page 5 of their brief, the defendants make the allegation that :

> "Teledyne's extensive experience with acquisitions led it to adopt a policy of requiring an escrow account to be established

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* Exhibits are referred to herein by their numbers listed in the Supplemental and Revised Index to Record on Appeal.

> whenever there were significant transactions with shareholders of the company acquired by Teledyne within one year of the acquisition."

Defendants give no reference to the record in substantiation of that allegation, because none exists.

In that same footnote the defendants state :

> "The Raab transaction for only 600 shares was considered insignificant and was not included in the escrow ."

Not only is there no foundation in the record for that statement, it is in direct conflict with the record. The formal acquisition agreement executed by TIC and Teledyne on July 27, 1966, provides for the pledge of $550,000 worth of Teledyne stock, to assure Teledyne, and secondarily TIC, against any liabilities arising out of the purchase by TIC of the 14,700 shares from Less and Raab. See Exhibit 21, at par. 7.18 thereof.

The draft of the form of the aforementioned Pledge Agreement prepared by Teledyne's counsel is Exhibit No. 165, which is reproduced in full at A. 538. Paragraph 4 thereof provides as follows :

> "4. TABER INSTRUMENT, MANASEN and D'ANGELO hereby agree to indemnify and hold harmless TELEDYNE and all of its subsidiary and affiliated corporations (and secondarily TABER, as provided below) against any losses, liabilities, expenses and costs

> (including reasonable attorney's fees) which may arise with respect to the purchase of 14,100 shares of TABER INSTRUMENT capital stock from Joseph F. Less and 600 shares from Junia E. Raab as well as with respect to the sale and issuance of 14,100 shares of TABER INSTRUMENT capital stock to MANASEN and D'ANGELO. This indemnification is made in addition to and not in contravention of any indemnities contained in the Agreement, and no inference is to be drawn herefrom as to the existence or non-existence of any liabilities pursuant to any representations and warranties contained in the Agreement. The purpose of this Pledge Agreement is to assure TELEDYNE (and secondarily TABER) with respect to the indemnity contained herein."

It was not until the July 27, 1966, acquisition agreement was amended by an Addendum dated December 22, 1966, (Exhibit No. 22), following further negotiations, that the provision for the Pledge Agreement was modified to refer only to the potential claim of Less.

4. In a footnote at page 6, the defendants give a recitation of alleged reasons why the executors of the Taber estate chose to settle the Less case, without citing any record reference, and in fact there is no foundation in the record. In fact, as the record shows, Less was settled on November 5,1974, the very date upon which trial was scheduled to begin. See combined transcript, R. 167, at pp. 111, et seq.

5. At page 7 the statement is made :

> "Further, most of Raab's associates at the company had died, retired or moved away, APP. 232."

Examination of reference "APP. 232" discloses that this conclusory allegation is derived solely from a similar allegation made upon information and belief in an affidavit of one of defendants' counsel, which also fails to name any of such supposed associates of Raab.

6. Also at page 7 of their brief, the defendants state without substantiation, and erroneously, that during the course of the litigation the plaintiff had twice faced dismissal and four times failed to comply with court orders intended to move the case on for trial. In fact, as the record clearly shows, Raab came up only once on the dismissal calendar and was removed therefrom routinely upon receipt by the court of Mr. Heffernan's letter of June 12, 1970 (A.297) pointing out the relationship between Less and Raab and referring to the discovery proceedings then in progress; further, there is no basis for the assertion that the plaintiffs failed to comply with the Court's orders.

7. At page 8, defendants' brief states that the testimony of the late Mr. Taber and Mr. McDonough was essential to establishing :

> "1) that the facts with respect to Teledyne known at the time of the Raab transaction were insignificant and not material to the Raab transaction, and 2), that such

> facts were in any event already known to Mr. Raab through his contacts with friends and colleagues at Taber Instrument Corporation."

There is not one iota of support in the record for the defendants' surprising assertion that Raab had prior knowledge of the Teledyne negotiations, and that defense was not even asserted by the defendants. On the contrary, in March, 1974, as part of their extensive memorandum in opposition to plaintiffs' motion to consolidate Less and Raab, the Siemer firm expressly acknowledged that as to Raab the defendants had no such defense of prior disclosure of the Teledyne negotiations, stating as follows, at A.156-157 :

> "Further, the actions brought by Less and Raab are greatly disparate. Less' complaint demands damages in the amount of $1,400,000. if recission is unavailable. Raab's complaint demands damages of only $60,000. if rescission is unavailable. Yet, from the pleadings it appears that the Raab action may have strengths totally lacking in the Less action. For example, the Raab sale took place at a date alleged to be closer to the closing of the sale of TIC's assets to Teledyne and thus closer to the reaching of any 'agreement in principle' as is alleged in both complaints. <u>While one of the Answers presents an allegation of disclosure in the Less action, no similar positive defense is asserted in the Raab action</u>." (Emphasis added)

8. At page 21 of defendants' brief, in discussing the agreement of counsel for all parties that the Less case

be tried first and that Raab be deferred until after disposition of Less, the following is stated :

> "Indeed some defendants believed that it made more sense to try the Raab case first. The Raab case was, by all accounts, the simpler case. There was no cross-claim, as there was in Less. The Company's claim for malfeasance was much simpler and more direct in Raab than in Less. The Raab sale occurred slightly closer to the Teledyne sale so that if the company defeated Raab's claims it would also defeat Less' claims, whereas if the company prevailed over Less, Raab could claim his case was still viable because his sale occurred later. The defendants who were of the view that the Raab case should be tried first deferred and no objection was raised."

No reference to the record is given in support of the foregoing quoted paragraph, and it is evident that the statements therein contained as to the defendants' assessments of the two actions were contrived for assertion for the first time in the defendants' brief on this appeal.

A footnote at page 21 states that "Raab was accused of converting company property and money to his own use." As has been shown above, there is no support in the record for that statement.

9. At page 31, in discussing their claim of prejudice by reason of the loss of McDonough, the defendants make the unconscionable statement that :

> "At trial, had Taber and the corporation

> waived the attorney-client privilege, McDonough could have supplied testimony to support Taber's version of the facts. He could have testified that Taber was not interested in the exploratory offer made by Teledyne and did not even bother to send the draft contract to him until some weeks after it arrived from Teledyne's lawyers. "

The defendants cite no record reference for that statement, and in fact the record is conclusively and directly contrary. The depositions of McDonough and Taber, and the exhibits marked thereon, show that on May 23, 1966, Taber received a letter dated May 16, 1966, from Dr. Singleton, president of Teledyne, which stated that its purpose was to reduce to writing the agreement in principle between TIC and Teledyne covering the acquisition of the business and assets of TIC by Teledyne. Said letter, which is Exhibit No. 29, is reproduced as Appendix A of this Brief. It includes the following paragraph :

> "1. Taber Instruments will transfer all of its business and assets to Teledyne in exchange for shares of Teledyne common stock having a market value of $3.8 million computed at or about the Closing Date of the transaction. Teledyne will also assume all of Taber Instrument's liabilities and obligations."

Taber responded to the aforesaid letter from Singleton with a letter dated May 24, 1966, (Exhibit No. 89, reproduced as Appendix B of this brief) in which he acknowledged receipt

of the Singleton letter of May 16 "regarding matters which we are negotiating," and stated that he had referred the letter to TIC's attorney, Charles McDonough, for review with the documents received from Teledyne's attorneys, Irell and Manella. Taber's letter goes on to say:

> "I am quite sure that the two firms can get together on the massive details involved.
>
> I wish to thank you for the letter of the 16th as it clarifies a good many points that have been raised."

The aforesaid exchange of letters acknowledging an agreement in principle for the sale of TIC to Teledyne for $3.8 million took place before the purchase of Raab's stock. In his deposition McDonough testified that his negotiations with Mr. Ness, Raab's attorney, for the purchase of Raab's stock for $8.00 per share took place on May [illegible], 1966, May 26, 1966, and June 1, 1966, and he admitted that before May 24, 1966, he was already aware of the Teledyne negotiations, having had at least one telephone conversation with Teledyne's counsel, Mr. Kaufman of Irell and Manella, concerning the first draft of the acquisition agreement which had been sent to Taber by Irell and Manella on May 6, 1966, with a covering letter (Exhibit No. 19) and had been forwarded by Taber to McDonough. See McDonough transcript, at A. 62-69.

10. At page 33 of their brief, under the caption "Defense of no reliance" defendants state :

> "While employed by the Company, Raab became aware of a number of offers from prospective purchasers. After Raab's departure from the corporation he kept in touch with a number of employees and former employees of the corporation, and through them he learned of Dr. Singleton's visit to the Taber plant in March, 1966, and of Teledyne's interest in purchasing the corporation. However, because of Taber's uniform rejection of such offers in the past Raab discounted any possibility that Taber would sell his company. "

The defendants can cite no reference in the record for the above statements, for they are pure fiction. The record is devoid of any indication that Raab had any inkling of the Teledyne interest in TIC prior to the purchase of Raab's stock. Furthermore, as is pointed out at page 13 of this brief, the defendants acknowledged of record as late as March 1974, that no such defense was asserted against Raab.

At page 34 defendants pursue the same specious discussion of Raab's "lack of reliance," alleging that they have lost the testimony of employees of TIC " with whom Raab had contact in 1966 ". No reference is made to the record, nor is any identification given of any such employees.

11. In a footnote at page 45 of their brief, the defendants attempt to excuse the untimeliness of their motion to dismiss in Raab by making the following incredible statement :

> "If defendants had been unable to settle the Less case at a reasonable figure a motion to dismiss would have been pursued. Similarly, if defendants had been able to settle the Raab case at a reasonable figure, no motion to dismiss would have been filed. Defendants never 'threatened' to pursue dismissal in either action ."

To accept that fanciful afterthought, one would have to believe that defendants' experienced and able counsel deliberately chose to pay more than one-half million dollars to settle Less, despite having had valid grounds for dismissal for lack of prosecution, and without even mentioning the possibility of such a motion in the course of the settlement negotiations !

DEFENDANTS' ARGUMENT OF FAILURE OF PROSECUTION

In some 18 pages of specious detail the defendants endeavor to find support for a ruling that plaintiff failed to prosecute this action. In addition to employing misrepresentations and distortions of pertinent facts and circumstances, they unjustifiably refer to the record in Raab alone , apart

from the proceedings in Less, where extensive and continual activity by plaintiffs took place during the period 1967 to 1971 with respect to discovery in furtherance of both actions.

In all, including additional depositions taken by the defendants in October 1972, twenty-four (24) depositions were taken consisting of many hundreds of pages of testimony, and more than two hundred exhibits were marked and discussed. Plaintiffs took three depositions of Ralph Taber; Hildebrandt, on two dates; Manasen; Teledyne, through its local manager; D'Angelo, on two occasions; and four depositions of McDonough. The defendants took three deposition of Less; a deposition of Raab, in October 1970; and depositions of Murphy and Sweet in October 1972. A. 5, 338.

The taking of Raab's deposition by the defendants in October 1970 was initiated by counsel for the plaintiffs. A. 305, 306.

The completion of the depositions was repeatedly delayed and adjourned because of conflicting engagements of defendants' counsel, especially Mr. McDonough, who was one of the district's busiest trial lawyers, and plaintiffs' counsel frequently protested such delays and requested better cooperation from opposing counsel in completing the necessary discovery. A. 290-296, 272-276.

In addition to the depositions mentioned, plaintiffs' counsel sought to take the depositions of Teledyne's president, Dr. Singleton, and counsel and corporate officer, Edmund Kaufman, in late 1970 and early 1971. When Teledyne's representatives ultimately reneged on their earlier indications of willingness to produce them in New York, plaintiffs' counsel served notices in May 1971 to examine Teledyne through its said officers in Buffalo, and served a subpoena duces tecum on Teledyne at its plant in North Tonawanda, New York. Teledyne moved to quash the subpoena, and after exchange of briefs, and oral argument in July 1971, the Court reserved decision. Nearly three months later, on October 12, 1971, the Court decided the matter in Teledyne's favor, and ruled that any such examination would have to be taken at Teledyne's place of business in California. However,in its six-page opinion the Court indicated that it considered the procedure followed by the plaintiffs' counsel to have had substantial merit, in view of the fact that Teledyne was concededly doing business in the judicial district. A. 638.

Under the prevailing practice, for the taking of the Teledyne depositions in California the plaintiffs would have had to pay the expenses of air fare and lodging of the three defense attorneys, in addition to the expenses

of plaintiffs' own counsel, and in view of this plaintiffs discontinued their efforts for such examinations. A. 249-251, 331.

In early 1971 plaintiffs served notice to take the examination of defendant Himmelfarb, a resident of Mexico. Himmelfarb defaulted in appearing and continued in default even after his attorney requested and was granted several postponements. In August and September 1971, during the period the parties were awaiting the Court's decision as to the Teledyne examinations, plaintiffs' counsel formally noted Himmelfarb's default and moved for relief, but when Himmelfarb's counsel informed the Court that he had been occupied in other matter, the Court excused said default, without terms or conditions, and also ruled that Himmelfarb's examination would have to be held in Mexico, unless plaintiffs bore the expense of his attending in this district. A. 251-253.

As to the plaintiffs' alleged failure of compliance in filing a pretrial statement asserted repeatedly in defendants' brief, it was common, accepted practice in the District to defer the filing of a pretrial statement, notwithstanding the wording of the pro forma order accompanying a notice of pretrial conference, since it might be determined at the conference that the case was not really ready for a final con-

ference, and the statement would therefore be premature or incomplete, as Magistrate Maxwell has confirmed. A. 383-385.

The pro forma order for a pretrial statement attached to the notice of pretrial conference on April 2,1971, was directed to all the parties, but none of the parties filed a pretrial statement for that conference. Plaintiffs thereafter fully complied by filing a complete joint pretrial statement for both actions prior to the February 1973 pretrial conference, (held after the defendants had completed discovery), but McDonough did not even file the pretrial statement required of his clients, TIC, Taber, Manasen and Hildebrandt, until two days after that conference. A. 254, 383-385.

The insinuation at page 15 of defendants' brief that plaintiffs delayed the proceedings by not objecting sooner to McDonough's acting as trial counsel is groundless. It was known to all parties early in the litigation that McDonough would be a witness as to his personal negotiations for the purchase of both the Less stock and the Raab stock and that therefore under the canons of ethics he was precluded from also acting as trial counsel. In fact, the Court itself raised that point at the March 1973 pretrial conference. A. 256, 388.

At least by July 1973 arrangements for substitute trial counsel in place of McDonough were in progress, as was represented at that time to the plaintiffs' counsel by representatives of the defendants. A. 256-257, 545. It was only after learning that despite the foregoing McDonough was expressing the intention of continuing as trial counsel for certain of the defendants that plaintiffs' counsel in their letter of March 20, 1974, reminded the Court of its own expression of concern over the matter at the March 1973 conference and informed the Court that, despite the substitution of Mr. Siemer as counsel for the Taber estate, McDonough apparently intended to remain as trial counsel for other defendants. A. 281. The engaging of Mr. Montgomery as alternate trial counsel for the plaintiff had nothing to do with the defendants' necessity of appointing their own trial counsel, and did not delay the proceedings a single day.

In striving to sever the ties between the Less case and the Raab case, the defendants undertake to disavow the countless instances in which Less and Raab were acknowledged to be allied or companion cases, with Less the lead case because of its far greater magnitude.

As is pointed out at page 21 of plaintiffs' main

brief, and more fully set forth in the affidavit submitted in support of the motion of consolidation (A. 121-125), Less and Raab shared many important issues of fact and law.

It was understood by counsel for all parties from the beginning that the basic discovery common to both cases was taking place in the Less action even though no formal stipulation to that effect was ever entered upon the record.

In addition, the two actions were always treated as companion cases by all parties and the Court. The many instances of this include the response to the February 1970 calendar call, and the confirming letter to the Court from plaintiff's counsel, James Heffernan, dated June 12, 1970 (A. 297); the express, and unchallenged, reference to Less and Raab as companion cases in plaintiffs' affidavit in opposition to Teledyne's motion to quash the subpoens duces tecum, in June 1971 (A. 613, 617); the consistent cross-indexing by the Court of matters affecting both actions in the docket entries of the two actions; the consistent convening of joint conferences or other proceedings in the two actions, often under jointly captioned notices, and so forth.

In addition, as has been pointed out in plaintiffs'

main brief, at the February 1973 pretrial conference before Magistrate Maxwell, McDonough, then counsel for all the defendants except Himmelfarb and D'Angelo, stated that once the Less case were disposed of there should be no difficulty in settling the Raab case along the same lines. Plaintiffs' counsel expressed their agreement, and neither counsel for D'Angelo nor Himmelfarb expressed any different view . (A. 254-255, 384-388).

In light of the position belatedly adopted by the defendants with respect to their motion for dismissal in Raab, the foregoing discussion at the February 1973 conference is of substantial importance. That said discussion in fact occurred is unrefuted in the record, despite the continued availability of the two attorneys present at that meeting representing D'Angelo and Himmelfarb, namely Frederick Sherwood, attending for D'Angelo in place of Robert Hitchcock,and Patrick Baker attending for Himmelfarb in place of Harold Boreanaz. No affidavit of either of them has been submitted to refute plaintiff's account of that discussion, as confirmed by the Magistrate. Thus, defendants' assertion at page 20 of their brief that "Since McDonough is now deceased, defendants have no way of refuting those reports", is misleading and deceitful.

The latest acknowledgment of the understanding of counsel concerning the relationship of the two actions was given by Miss Siemer, present counsel for the principal defendants, Taber estate and TIC, at the March 19, 1975, proceeding before the Court, when she said :

> "This was a case that was tagging along with the Less case. Everyone's attention was focused on the Less case. There is very little discovery in this (the Raab) case. " App. 178

At page 22 of their brief defendants attempt to disavow the clear import of the above statement, which is, of course, diametrically opposite to the position they elected to adopt about a month and a half later in their last-ditch, afterthought motion to dismiss. Their explanation that the above quoted remarks "relate back only to June 1974" rings hollow, for obviously any such lack of discovery would necessarily relate back to the inception of the action.

With respect to defendants' reference to the trial court's statement in his decision of dismissal as to warnings of possible dismissal "given on numerous occasions", not only have plaintiff's counsel denied under oath ever having received any such warnings, but the defendants in their affidavits have cited no such instance, nor is there any substantiation for same in the record. As is shown by the Trans-

cript Order on appeal dated March 22, 1976, plaintiff ordered from the court reporter transcripts of all proceedings held in Less or Raab (in addition to those of March 19, 1975, previously furnished) and the court reporter has accordingly furnished transcripts of all such proceedings in which stenographic record was taken, namely, those held June 3, 1974, June 24, 1974, July 24, 1974, November 5, 1974 and February 5, 1976. See combined transcript, R. 167. Nowhere in any of those proceedings is any such warning recited or even referred to, by the Court or anyone else.

DEFENDANTS' CLAIM OF PREJUDICE IS BOTH UNFOUNDED AND UNJUSTIFIED

The record shows that defendants delayed the progress of the litigation repeatedly both during the earlier period of Mr.McDonough's representation of TIC, et al, and the period after March 1973 when the defendants entered upon their protracted process of appointing substitute trial counsel in place of McDonough. A. 248, 272-278, 288-296, 343-344, 389-392. For that reason alone, the defendants are precluded in equity and good conscience from claiming prejudice by reason of the deaths of Taber and McDonough. In any event, however, their assertion of prejudice by reason of the unavailability

of the live testimony at trial of Taber and McDonough is trumped up and spurious.

As pointed out at page 18 of plaintiff's main brief, McDonough, not Taber, negotiated the purchase of Raab's stock. Transcript, McDonough deposition, A. 53. As to the Teledyne negotiations, Taber testified fully in his extensive depositions, which cover 320 pages and over 40 exhibits. Taber transcripts, R. 62, 63, 64. The record establishes that prior to negotiations by McDonough for the purchase of Raab's stock, Taber had already : (1) received a first draft of the formal acquisition agreement from Teledyne, setting forth a price of $3.8 million, or approximately $50 per TIC share (Exhibit Nos. 19 and 20); (2) received a three-page letter from Teledyne's president, Singleton, outlining, in the words of said letter, "our agreement in principal (sic) covering the acquisition of the business and assets of Taber Instruments Corporation by Teledyne" and confirming that the price agreed upon was $3.8 million in Teledyne stock (Exhibit No. 29); and, (3) written a letter in response to the aforesaid letter, confirming that the agreement as outlined therein "appears satisfactory" (Exhibit No. 89).

The record further shows that a formal acquisition agreement embodying the terms outlined in Singleton's aforesaid letter, and with the same purchase price, was thereafter signed by Teledyne and TIC under date of July 27, 1966 (Exhibit No. 21); that said agreement was thereafter modified in December 1966, with respect to terms other than price (Exhibit No.22); that the acquisition was consummated on December 30, 1966, and distribution of the Teledyne shares made to the TIC shareholders in May 1967, as is conceded at footnote 28, at page 20, of defendants' brief.

McDonough testified fully with respect to his negotiations with Raab's then attorney, Mr. Ness, for the purchase of the stock, i.e., that he, McDonough was then already aware of the Teledyne negotiations; he confirmed that the date upon which his negotiations for Raab's stock began was after the time of the above described exchange of letters between Teledyne and Taber confirming their agreement for the acquisition, and he admitted that he did not disclose the Teledyne negotiations to Mr. Ness, and that no reference to same was ever made in the course of their several conversations leading to the purchase of Raab's

stock for $8.00 a share on June 6, 1966; he further testified that the payment of profit sharing monies demanded by Raab in the then pending state court action was a part of the transaction for the purchase of the Raab stock. McDonough transcript, July 13, 1970, A. 53-80.

Thus, both Taber and McDonough testified fully regarding their knowledge of the facts and circumstances pertinent to the issues in Raab i.e., (1) Were the Teledyne negotiations of sufficient seriousness or importance, at the time of the negotiations for the purchase of Raab's stock, as to require their disclosure? (2) Was such disclosure in fact made?

Defendants' belated claim that they need the testimony of McDonough in order to establish a defense of "lack of reliance" by Raab is sham.

Furthermore, even if it were true, as is alleged in defendants' brief (without foundation in the Record) that Raab became aware of Teledyne's interest, through contacts at Taber, and that Raab discounted any possibility that Taber would sell his company because of, in defendants' words "Taber's uniform rejection of such offers in the past", the defendants would still have owed Raab the duty of dislosing that, in this instance, Taber was not only receptive but had

in fact already agreed to sell the company to Teledyne at a price of $50.00 per TIC share.

At pages 39 and 40 of their brief, defendants set forth a list of alleged delays on the part of plaintiffs during the period 1973-1975. Plaintiff's response to those items is as follows :

1. No delay whatsoever was occasioned by the timing of appointment of plaintiff's trial counsel and defendants have cited none.

2. As has been pointed out earlier in this brief, the Court itself had raised objection at the March 1973 pretrial conference to representation of any of the defendants at trial by McDonough. A. 256. Plaintiff's letter of March 20, 1974 was an effort to seek the Court's assistance in ending the delays occasioned by McDonough's announced intention of remaining as trial counsel for certain defendants even though he had already been replaced as trial counsel for the Taber estate.

3. At the conclusion of the February 7, 1973, conference, Magistrate Maxwell announced that he would refer both cases to the Court for the scheduling of the trial date. From that point on, the matter of the scheduling of the two

cases for trial was entirely in the hands of the Court, and plaintiffs were at all times ready and so declared themselves at every opportunity.

4. The plaintiffs' reason for not moving immediately for substitution of the executors as defendants was that counsel for the Taber estate had indicated it would be accomplished by stipulation. A. 545.

5. Between August 21, 1973 and February 7, 1974, plaintiffs were waiting for the defendants to announce their decision as to who was replacing McDonough as trial counsel. A. 385, 545.

6. The motion for consolidation was made in good faith and with substantial merit. The reasons for withdrawing it were set forth in the letter of plaintiffs' counsel dated March 20, 1974. A. 279. That matter occasioned no delay in the progress of the litigation to trial.

7. Plaintiffs' objection to the ex parte appointment of a trustee for the corporation was made in good faith and upon substantial grounds, and was joined in by D'Angelo's counsel (R. 201) and supported by McDonough's statements. Combined transcript, R. 167, at pages 8-13.

8. Plaintiffs diligently complied with the Court's order to prepare an exhibit list, despite being hampered by lack of cooperation from the defendants, and no delay in meeting the trial date already scheduled was thereby occasioned.

9. No delay in the proceedings was occasioned by the fact that plaintiff had not made a motion to admit in the Raab case the depositions in Less case, in view of the fact that at the insistence of the defendants the Court had already put the trial off so that the defendants could take additional discovery.

10. Plaintiff's response to defendants' motion to dismiss was filed on May 15, 1975, pursuant to verbal three day extension of the Court.

11. The D'Angelo interrogatory was served three weeks after the defendants' motion to dismiss was filed, and has no relevancy to the issues on appeal. In addition it was objectionable on its face, and no attempt was made by D'Angelo's counsel to enforce it.

The defendants' only apparent excuse for the untimeliness of their motion to dismiss in May 1975 is that it was not until then that they found themselves unable to make

a "reasonable" settlement of Raab. For example, at pages 45 and 46, they arbitrarily assert that plaintiff's maximum recovery on the merits would be $30,000, and claim to have already paid plaintiff over $28,000. * In so doing they make arbitrary and capricious claim for credit for offset of the amount of some $23,000 paid to Raab in settlement of his entirely separate claim for profit sharing monies which was in fact paid to him by a party other than any of the defendants, i.e., the profit sharing plan itself, and was paid in settlement of a separate action then pending in a different court. A. 101.

The cases cited by the defendants are distinguishable on their facts from this case, for they all involve situations of long, unexcused delay on the part of the plaintiff of such nature and extent as to lull a defendant into assuming that the plaintiff did not seriously intend to bring the case on for trial, or serious violations of or non-compliance with Court calendar rules and orders.

Such is not the case here. The exhaustive

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* It is interesting that despite the defendants' assertion of having paid Raab $28,000, or about $47 per share, in June 1966, at the July 27, 1966, meeting of directors at which the Raab stock purchase was approved, the directors also approved the sale to defendants D'Angelo and Himmelfarb of the former Less stock at a price of $10. per share, and also approved sale of TIC to Teledyne for $50 per share. See Exhibit No. 11

assemblage of specious detail set forth in defendants' motion to dismiss and in their brief on appeal, while replete with distortions and misrepresentations of the actual facts and circumstances of the litigation in Less and Raab, cannot gainsay that despite the many delays attributable to the defendants and the difficulties thereby encountered in completing plaintiffs' discovery, plaintiffs':

1. Declared both cases ready at the ensuing call of the calendar following their filing of notes of issue in October 1971.

2. Announced both cases ready for the plaintiffs at the pretrial conference in August 1972.

3. Declared plaintiffs ready at the March 13, 1973, pretrial conference before the Court.

4. Proceeded with preparation for trial in Less following agreement of all counsel, and the Court, in June 1974 that Raab be deferred until disposition of Less.

5. Obtained settlement in Less on the very day scheduled for trial, in the amount of $560,000.

The circumstances which the defendants claim as the basis for dismissal of Raab all took place prior to the June 1974 agreement to defer Raab. Those circumstances

remained unchanged, despite the subsequent death of Mr. McDonough.

EVIDENTIARY HEARING

Plaintiff urges that in view of the pertinent portions of the record to which reference has been made in plaintiff's main brief and this reply brief, it was a clear abuse of discretion for the court below to have granted defendants' motion to dismiss, and thereafter to have denied plaintiff's motion to have the judgment of dismissal set aside.

It is especially so in view of the remarks of the defendants' counsel and the Court in the March 19,1975 proceedings, confirming that Raab had been "tagging along with the Less case", that such was the practical way to handle the litigation; in view of the tremendous disparity of the magnitude of the two cases. (A. 402-403, 406); and that the reason for following that course of action was the similarity of the problems and issues in the two cases. A. 397-400.

In any event, however, it was an abuse of discretion for the District Court to have ruled as it did, and to have made findings of fact which were unsubstantiated in the record and were controverted by plaintiff's affidavits

and exhibits, without affording plaintiff the opportunity to present testimony at a full hearing.

Defendants' claim that plaintiff waived the right to such a hearing in connection with the motion to dismiss is invalid. Not only did the plaintiff set forth in detail in their affidavits and exhibits statements of fact and references to the record, in opposition to the motion, he cited confirmation by the Magistrate as to facts material to the supervision by the Court of the progress of the two actions and full compliance by both plaintiffs, Less and Raab, with pretrial requirements of the Court and Magistrate. A. 253-255, 289, 341-342,383-385. Furthermore, after the filing of the motion to dismiss the Court itself gave the plaintiff to understand that it would not grant the motion without affording the plaintiff such a hearing. A. 392.

After the Court had so ruled on defendants' motion, apparently in substantial reliance upon the misrepresentations and distortions contained in their affidavits, even though controverted by plaintiff, the plaintiff sought to point out to the Court the grievous wrong which had been done, and in the affidavits and exhibits on plaintiff's motion to vacate the judgment of dismissal, referred at length to the testimony

which the Magistrate had indicated he would give upon such a hearing, in direct contradiction to several serious findings made by the Court.

Under the foregoing circumstances it was a grave abuse of discretion, and a denial of due process, to have granted the defendants' motion, and denied the plaintiff's motion for relief from the judgment, without affording such evidentiary hearing.

CONCLUSION

FOR THE REASONS STATED ABOVE AND IN PLAINTIFF'S PRINCIPAL BRIEF THE JUDGMENT OF DISMISSAL AND DENIAL OF THE MOTION FOR RELIEF FROM SAID JUDGMENT SHOULD BE REVERSED, AND THE ACTION REMANDED FOR TRIAL, OR IN THE ALTERNATIVE, THE ACTION SHOULD BE REMANDED FOR A FULL HEARING AS TO THE ISSUES PRESENTED.

Respectfully submitted,

HEFFERNAN, SWEET & MURPHY
Attorneys for Plaintiff-Appellant
1202 Marine Trust Building
Buffalo, New York 14203

DAVID L. SWEET, Of Counsel

Dated: July 6th, 1976

TELEDYNE, INC.

May 16, 1966

Taber Instruments Corporation
111 Goundry Street
North Tonawanda, New York

Attention: Mr. Ralph Taber

Gentlemen:

The purpose of this letter is to reduce to writing our agreement in principal covering the acquisition of the business and assets of Taber Instruments Corporation by Teledyne. This letter is intended to be reasonably complete in covering the principal terms of our understanding and will lead to a more formal agreement covering the various details and necessary amplifications.

1. Taber Instruments will transfer all of its business and assets to Teledyne in exchange for shares of Teledyne common stock having a market value of $3.8 million computed at or about the Closing Date of the transaction. Teledyne will also assume all of Taber Instrument's liabilities and obligations.

2. The transaction will be structured as a tax-free reorganization under §368(a)(1)(C) of the Internal Revenue Code of 1954, as amended.

3. The transaction will further be structured so as to result in the issuance of stock which will be freely transferable by the Taber Instruments shareholders who are not in control of Taber Instruments and so as to be transferable under the "1% Rule" of Rule 133 as to those shareholders of Taber Instruments who are in control.

4. Both parties will make the customary warranties and representations in transactions of this sort covering their respective financial conditions, the absence of undisclosed liabilities, title to assets and other matters.

5. Between this date and the Closing Date, Taber Instruments will agree to conduct its business in the

ordinary course and generally to consult with Teledyne respecting any extraordinary or unusual transactions or commitments, and in any event not to issue or acquire any of its stock or securities.

6. It is contemplated that after the acquisition has been completed, the management and employees of Taber Instruments will continue as management and employees of that division of Teledyne which will continue the Taber business.

7. Teledyne's obligation to complete the agreement and issue its stock must, of course, be contingent upon its ability to obtain proper authorization from the Commissioner of Corporations of the State of California and the New York Stock Exchange so as to enable the listing of the stock issued to Taber Instruments upon such exchange. We further expect that counsel for Taber Instruments and Teledyne will render their opinions covering pertinent legal aspects of the transaction.

8. Taber Instruments shall, of course, be entitled to retain cash sufficient to pay all of its expenses of the reorganization.

It is understood that we shall proceed in the direction of executing a more formal and detailed agreement along the terms outlined above. Such formal agreement is likely to contain provisions not precisely described above but not inconsistent except to the extent problems arise which we have not yet considered. Finally, our agreement in principal is, of course, contingent with respect to the obligations of both parties upon the delivery of financial statements and other data by each to the other which is not inconsistent with what has been represented up to now.

Please sign and return to me the enclosed carbon copy of this letter indicating your acceptance and agreement to the above. I am looking forward to the

combination of our companies which, I am sure, will result in a rewarding and enduring relationship.

Cordially,

TELEDYNE, INC.

By _____
Henry E. Singleton
President

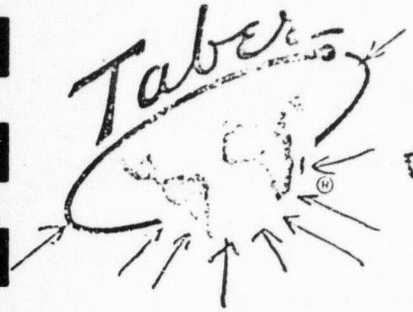
AGREED AND ACCEPTED:

TABER INSTRUMENTS CORPORATION

By _____
Ralph Taber
President

TELEPHONE 716 694-4000
TWX 716 550-1542

File



INSTRUMENT CORPORATION

AEROSPACE ELECTRONICS DIVISION
SALES OFFICE-107 GOUNDRY ST
NORTH TONAWANDA, N. Y. 14120
U.S.A.

May 24, 1966

Teledyne, Inc.
12525 Daphne Avenue
Hawthorne, California

Attention: Dr. Henry E. Singleton, President

Dear Dr. Singleton:

I acknowledge your letter of May 16, which was received yesterday, May 23, regarding matters which we are negotiating.

The writer, being an engineer, is not fully acquainted with all the details set forth in the letter, although it appears satisfactory. I have referred same to our Corporation Attorney, Mr. Charles J. McDonough of McDonough, Boasberg, McDonough & Beltz, 930 Walbridge Building, Buffalo, New York 14202, for review as well as the document received from your Attorneys, Irell & Manella.

I am quite sure that the two firms can get together on the massive details involved.

I wish to thank you for the letter of the 16th as it clarifies a good many points that have been raised.

With best personal regards, I remain

Very truly yours,

TABER INSTRUMENT CORPORATION

R. F. Taber
President

RFT:MM

APPENDIX "B"